FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1960

No. 502

AMERICAN MUTUAL LIABILITY INSURANCE Co., a corporation,

Petitioner,

vs.

E. VERNON ASHLEY, KATHLEEN ANN GOFF, CHARLES T. GOFF, JR., and BETTE JO GOFF, Minors, By and Through Their Guardian Ad Litem, Charles T. Goff, and CHARLES T. GOFF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

M. MITCHELL BOURQUIN,

Counsel for Petitioner.

ROBERT L. LAMB,
LAMB & HOGE,

Of Counsel.

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AMERICAN MUTUAL LIABILITY INSURANCE Co., a corporation,

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vs.

E. VERNON ASHLEY, KATHLEEN ANN GOFF, CHARLES T. GOFF, JR., and BETTE Jo GOFF, Minors, By and Through Their Guardian Ad Litem, Charles T. Goff, and CHARLES T. GOFF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Petitioner American Mutual Liability Insurance Co., a corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause August 25, 1960.

OPINIONS BELOW.

The opinion of the District Court is reported at 167 F. Supp. 125. The opinion of the Court of Appeals, affirming the judgment of the District Court is printed in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals sought to be reviewed was dated and entered August 25, 1960, and a copy thereof is printed in the Appendix hereto. No petition for rehearing was filed. By order dated September 26, 1960, the mandate was stayed to and including October 25, 1960, in order to allow petitioner to prepare and file this petition with the Clerk of this Court, and thereafter until such time as the petition may be granted or denied, and, if granted, until the final determination of the cause. Jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTION PRESENTED.

Whether the Court of Appeals has decided an important state question of insurance law in a way in conflict with applicable state law.

STATUTES INVOLVED.

California Insurance Code, §330 (Stats. 1935, c. 145, p. 505, §330):

> "Neglect to communicate that which a party knows, and ought to communicate, is concealment."

California Insurance Code, §331 (Stats. 1935, c. 145, p. 505, §331):

> "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance."

California Insurance Code, §334 (Stats. 1935, c. 145, p. 505, §334):

> "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

California Insurance Code, §358 (Stats. 1935, c. 145, p. 506, §358):

> "A representation is false when the facts fail to correspond with its assertions or stipulations."

California Insurance Code, §359 (Stats. 1935, c. 145, p. 506, §359):

> "If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false."

California Insurance Code, §447 (Stats. 1935, c. 145, p. 508, §447):

> "The violation of a material warranty or other material provision of a policy, on the part of either party thereto, entitles the other to rescind."

California Insurance Code, §650 (Stats. 1935, c. 145, p. 512, §650):

> "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this part such right may be exercised at any time previous to the commencement of an action on the contract."

STATEMENT OF THE CASE

By a complaint for declaratory relief, filed August 29, 1956, the plaintiffs (respondents herein) sought to subject a policy of malpractice insurance extended by defendant (petitioner herein) in January of 1955 to Dr. Ashley, one of the plaintiffs, to payment of a claim for damages asserted against him by the other plaintiffs. (T. 3-48.) As heirs at law of Bette Jo Goff they claimed that her death was the product of Dr. Ashley's malpractice in treating her during the six months immediately preceding October 26, 1955. (T. 4.)

Defendant had issued a policy of group malpractice insurance to the San Joaquin County Medical Society for a period commencing April 25, 1952 and ending May 1, 1956. (T. 25-44.) The policy provided for ex-

tending the insurance to additional insured to whom certificates of insurance would be issued under the policy. (T. 25-26.) In January of 1955, Dr. Ashley, a medical doctor, was practicing his profession at Lodi, in San Joaquin County, and had made application to become a member of the San Joaquin County Medical Society. (T. 57.)

From July to October or November of 1954, Dr. Ashley had practiced his profession in Hollywood, California, employed as an associate of a Dr. Carter. (T. 146.) During that period Dr. Ashley became a narcotic addict, using demerol. He prescribed excessive and unnecessary quantities of demerol for Mary Adelstein, a patient of the office, and caused her to become a narcotic addict. (T. 66.) He used her name on prescriptions to obtain demerol for himself, and he used demerol dispensed for her use. (T. 66.)

In November of 1954, Dr. Ashley became a patient at the Glendale Sanitarium near Hollywood and began treatments for narcotic addiction. (T. 136, 149.) While he was in the sanitarium Mary Adelstein asserted a claim against Dr. Ashley and Dr. Carter and threatened suit. (T. 142-143.) Ward Mikkelson, management consultant for Dr. Carter, discussed the Adelstein claim with Dr. Ashley at the sanitarium. (T. 135-137, 139.)

Under date of November 26, 1954, Dr. Carter wrote a letter to Dr. Ashley at the sanitarium. It was admitted in evidence as Defendant's Exhibit C. (T. 134-135.) It is quoted:

"Nov. 26, 1954

Dear Dr. Ashley,

Gladys informed me yesterday that you expected to leave the Hospital next week & go back to work.

This, I think you'll be making a big mistake because you have had no treatment as yet & I know it will be some time yet before you'll be able to do so. It just isn't a wise move for you to make, even when you feel in yourself that you can.

Another thing I have not had any medical coverage for you as yet & I would have to get it before you can start in to work. Also with the impending suit for malpractice I would hesitate just yet, hoping that nothing will come by it & that it will soon blow over.

I was glad to see you improving in the Glendale San & Hosp. last week end & hope that you will keep it up.

Trusting that you'll take my advice not only for my sake but your own. For the same problems at the office may not yet be reduced that you thought might have caused you to be so nervous & upset. I am hoping that I can in the future help this condition too, but it will take a little time.

It wouldn't hurt to talk to Mr. Mikkelsen & he might also help you in your decision how to better yourself right now.

Yours sincerely,
(Signed) A. R. Carter, M.D."

Dr. Ashley's narcotic activities during his treatment of Mary Adelstein resulted in four criminal charges being filed against him in the Los Angeles Municipal Court for violation of the narcotics laws. He pleaded guilty to these charges on November 26, 1954, and on December 10, 1954, he was given a suspended sentence of 180 days, fined $250, and placed on probation for three years. (T. 74-77.)

In applying for malpractice insurance in San Joaquin County in January of 1955, Dr. Ashley signed a combined "Application-Binder for Professional Liability Insurance" and "Representations for Professional and Premises Liability Insurance". (T. 55-59.) Questionnaire 15 and his answer thereto were as follows (T. 58):

> "15. No claims for professional errors or mistakes have ever been made against me nor has any insurer cancelled any professional liability insurance issued to me, or declined to issue such insurance except as follows: *None.*"

The policy of insurance extended to Dr. Ashley pursuant to his application and representations, provided (T. 27-28, 34):

> "Limitations
>
> This policy does not apply, except for defense, as respects any injury resulting: * * *
>
> (2) From the acts or omissions of the insured while intoxicated or under the influence of drugs or narcotics or resulting from a criminal act; * * *"

"Representations

(17) By acceptance of this policy or any certificate, the insured agrees that the statements in the representations, that this policy is issued in reliance upon the truth of such representations, and that the policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."

In February of 1955 an action was filed by Mary Adelstein in the Superior Court in Los Angeles County claiming damages of $300,000 against Dr. Ashley, Dr. Carter, and others, wherein it was alleged that Dr. Ashley was a narcotic addict, that malpractice on his part caused Mary Adelstein to become a narcotic addict, and that he had used her name and prescriptions to obtain narcotics for his own use. A copy of the complaint in that action (63-67) was admitted in evidence at the trial of this action. (T. 167-168.)

Newspaper reports of narcotic activities and sex derelictions of Dr. Ashley in San Joaquin County led the defendant to information and investigation of the doctor's derelictions in Southern California and disclosure of the Mary Adelstein claim and suit. (T. 160-162.)

On or about July 15, 1956, defendant caused notice of rescission of the insurance contract to be served upon Dr. Ashley. A copy thereof was admitted in evidence as Defendant's Exhibit B. (T. 134-135.) Accompanying the notice was a certified check for return premium in the sum of $203.58 payable to Dr. Ashley. (T. 133-134.) The check was accepted, endorsed, and

cashed by Dr. Ashley and the attorney representing him. The check was admitted in evidence as Defendant's Exhibit A. (T. 133-134.)

As stated, the present action was filed August 29, 1956. (T. 48.) Affirmative defenses of concealment, misrepresentation, breach of warranty, and rescission were averred in the answer and cross-claim of defendant and the amendments thereto. (T. 49-67, 67-77, 89-90.) They were based upon the Mary Adelstein claim against Dr. Ashley, his narcotic addiction, his conviction in the Los Angeles Municipal Court on criminal charges of violating the narcotic laws, and the resulting deprivation of his narcotic stamp and right to prescribe narcotics.

An official of the defendant insurance company testified at the trial that the company would not issue malpractice insurance to a doctor addicted to the use of narcotics, or to a doctor using narcotics or against whom a claim was made that his treatment had caused a patient to become a narcotic addict. (T. 157-158.)

The Court of Appeals had affirmed a judgment of the District Court declaring defendant (petitioner) liable to plaintiffs (respondents) under said policy of malpractice insurance.

REASON FOR GRANTING THE WRIT.

(a) THE COURT OF APPEALS HAD DECIDED AN IMPORTANT STATE QUESTION OF INSURANCE LAW IN A WAY IN CONFLICT WITH THE APPLICABLE CALIFORNIA LAW.

The opinion of the Court of Appeals recognizes that California insurance law is applicable. But it does not follow or apply that law.

Under California insurance law, Dr. Ashley was charged with the duty of exercising the utmost good faith in his dealings with the defendant insurance company. His narcotic activities in Southern California leading to his own addiction and the betraying and degrading of Mary Adelstein, his patient, amounted to moral turpitude and unprofessional conduct authorizing revocation or suspension of his license to practice. (*Meyer v. Board of Medical Examiners*, 34 Cal. 2d 62, 64, 206 P. 2d 1085; *Davis v. State Board of Medical Examiners*, 108 Cal. App. 2d 346, 350, 239 P. 2d 78; *Brainard v. State Board of Medical Examiners*, 68 Cal. App. 2d 591, 157 P. 2d 7.)

Under California law, Mary Adelstein had made a "claim for professional error or mistakes" against Dr. Ashley before he moved from Southern California to San Joaquin County. (*People v. Teitelbaum*, 163 Cal. App. 2d 184, 212, 329 P. 2d 157; *Mellus v. Potter*, 91 Cal. App. 2d 700, 794, 267 P. 2d 562.) In applying for malpractice insurance in San Joaquin County Dr. Ashley not only concealed the Adelstein claim and his derelictions and criminalities giving rise to it and his own narcotic addiction, but he falsely represented that claim of that sort had never been made against him. California insurance law does not tolerate such

concealment or misrepresentation in obtaining insurance and holds that insurance thus obtained is void ab initio. (*Cohen v. Penn. Mut. Life Ins. Co.*, 48 Cal. 2d 720, 725-726, 312 P. 2d 242; *Glickman v. New York Life Ins. Co.*, 16 Cal. 2d 626, 635, 107 P. 2d 252; *Telford v. New York Life Ins. Co.*, 9 Cal. 2d 103, 107, 69 P. 2d 835; *Cole v. Calaway*, 140 Cal. App. 2d 340, 347-348, 295 P. 2d 84; *Standard Accident Ins. Co. v. Pratt*, 130 Cal. App. 2d 151, 156, 278 P. 2d 489; *De Campos v. State Comp. Ins. Fund*, 122 Cal. App. 2d 519, 527-529, 165 P. 2d 617.) Therefore, neither Dr. Ashley nor the other plaintiffs could recover against defendant under California law. (*Standard Accident Ins. Co. v. Pratt*, supra, 130 Cal. App. 2d 151, 156-157, 278 P. 2d 489; *Robinson v. Occidental Life Ins. Co.*, 131 Cal. App. 2d 581, 586, 281 P. 2d 39.) Heretofore the Court of Appeals for the Ninth Circuit has accepted and applied that law. (*Merchants Fire Assur. Corp. v. Lattimore*, 264 F. 2d 232, 239; *National Life & Acc. Ins. Co. v. Gorey*, 249 F. 2d 388, 392; *Gates v. General Casualty Co. of America*, 120 F. 2d 925, 926-927; *Georgia Casualty Co. v. Boyd*, 34 F. 2d 116, 117-118.) It did not do so in this case.

And under California law, rescission was timely and effectual as to Dr. Ashley and the other plaintiffs. (*Hallidie v. Sutter St. R.R. Co.*, 63 Cal. 575, 577; *Long v. Newlin*, 144 Cal. App. 2d 509, 512, 301 P. 2d 271; *McCreary v. Mercury Lumber Distributors*, 124 Cal. App. 2d 477, 486, 268 P. 2d 762; *Mirich v. Underwriters at Lloyd's*, 64 Cal. App. 2d 522, 530, 149 P. 2d 19; *Federal Life Ins. Co. v. Cary*, 20 Cal. App. 2d 257, 261, 67 P. 2d 129.) The Court of Appeals did not apply this law.

CONCLUSION.

For the foregoing reasons it is therefore respectfully submitted that a writ of certiorari should be granted.

Dated, San Francisco, California,
October 19, 1960.

M. MITCHELL BOURQUIN,
Counsel for Petitioner.

ROBERT L. LAMB,
LAMB & HOGE,
Of Counsel.

(Appendix Follows.)

Appendix

United States Court of Appeals
For the Ninth Circuit

AMERICAN MUTUAL LIABILITY INSURANCE Co., a Corporation, *Appellant,* vs. KATHLEEN ANN GOFF, CHARLES T. GOFF, JR., and BETTE JO GOFF, Minors By and Through Their Guardian Ad Litem, Charles T. Goff, and CHARLES T. GOFF, *Appellees.*	No. 16,375 Aug. 25, 1960

On Appeal from the United States District Court for the Northern District of California, Northern Division.

Before: Pope, Hamley and Koelsch, Circuit Judges.

Koelsch, Circuit Judge:

This is an appeal by the American Mutual Liability Insurance Company from a declaratory judgment imposing liability on it under a professional liability insurance policy for any judgment obtained against the named insured, Dr. E. Vernon Ashley, in a then pending malpractice action filed in California Superior Court by the heirs of Bette Jo Goff, deceased. Judgment was eventually entered in the state court

against the said insured in the amount of $75,932.00. The instant action was brought by the above heirs and the insured after appellant had withdrawn from Dr. Ashley's defense during the state trial and tendered notice of rescission of the policy.[1] Jurisdiction is conferred by diversity of citizenship and 28 U.S.C.A. §2201.

The two main questions presented by this appeal are whether appellant is entitled to rescind its policy because of Dr. Ashley's purported misrepresentation or concealment of material facts in applying for the policy of insurance.[2]

The facts, so far as pertinent, reveal that Dr. Ashley practiced medicine in Hollywood, California as an associate of one Dr. A. E. Carter during the latter part of 1954. In November of that year, Mrs. Adelstein, a patient, telephoned one of the office nurses at the latter's home and expressed dissatisfaction with the treatment she had received from Dr. Ashley. Although this precise conversation is not clear from the

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[1]Dr. Ashley made no appearance at the trial, nor was he represented in any way; the lower court gave no consideration to his portion of the prayer in the complaint requesting reimbursement of costs incurred by him in the defense of the Goff actions, so that matter is not before us.

[2]In determining these questions, we are governed by California law. Calif. Civil Code §1646; National Life and Accident Ins. Co. v. Gorey, 249 F.2d 388 (9th Cir. 1957). California has by statute expressly recognized the right of an insurer to rescind on either of the grounds stated by appellant in the following sections of its Insurance Code:

331: Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance.

359: If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false.

record, the import of Mrs. Adelstein's grievance was that she had become addicted to narcotics because Dr. Ashley had prescribed excessive quantities for her; she threatened to sue.

The nurse informed the resident manager of the office of the telephone call, and the latter in turn relayed the information to Dr. Carter and one Ward Mikkelson, management consultant of the office. At the time Dr. Ashley was himself in a sanitarium in Glendale, California, undergoing treatment for narcotics addiction, and Mikkelson there informed him of the complaint. This visit was followed by a letter from Dr. Carter in which he referred to the "impending suit for malpractice," but expressed the hope that "nothing will come of it and that it will soon blow over."

A criminal prosecution grew out of Dr. Ashley's treatment of Mrs. Adelstein, and on December 10, 1954, following a plea of guilty and conviction of violations of the California Health and Safety Code,[3] he was sentenced to pay a fine and serve a term in jail. The jail sentence, however, was suspended; Dr. Ash-

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[3] The sections under which Dr. Ashley was convicted are as follows:

11165: No person shall issue a prescription that is false or fictitious in any respect.

11225: Every person who issues a prescription, or administers or dispenses a narcotic shall make a record that, as to the transaction, shows all of the following:

(a) The name and address of the patient.

(b) The date.

(c) The character and quantity of narcotics involved.

(d) The pathology and purpose for which the prescription is issued, or the narcotic administered, prescribed, or dispensed.

ley was placed on probation for three years and lost his narcotics stamp, i.e., the right to prescribe narcotics.

It was after these events that Dr. Ashley applied for and received his professional liability insurance. He obtained a temporary binder on January 9, 1955, and submitted a formal application upon a written form supplied by the appellant on January 19, 1955; the policy became effective, retroactively, on January 9th. In the application, Dr. Ashley made the following representation:

> 15. No claims for professional errors or mistakes have ever been made against me nor has any insurer cancelled any professional liability insurance issued to me, or declined to issue such insurance except as follows: *None.*

The first question raised by the appellant is whether the above answer is a "misrepresentation" which would justify appellant's rescission. This defense stems from the general principle that an insured, at the time he seeks to obtain insurance, is obliged to disclose fully and fairly to the insurer all those matters of which he is aware affecting the risk for which the policy is issued and which would normally tend to influence the insurer in deciding whether to enter into the contract. Telford v. N.Y. Life Ins. Co., 9 Cal. 2d 103; 69 P. 2d 835 (1937). In order to establish misrepresentation, the burden was on the appellant to show that the above answer to Question 15 was false and material to the risk of the policy. Mayfield v. Fidelity Casualty Co., 16 Cal. App. 2d 611; 61 P. 2d 83

(1936); Employers' Liability Assur. Corp. v. Ind. Acc. Com., 177 Cal. 771; 171 Pac. 935 (1918). The lower court held that Question 15 was ambiguous and, construing it in favor of the insured, ruled that it did not encompass the type of grievance presented by Mrs. Adelstein and therefore appellant had not met its burden of proof on this issue.

We agree. Question 15 is far from clear: it does not delineate or explain the extent of the "claims for professional errors" which are required to be disclosed in the application; the uncertainty is whether the "claims" referred to include all grievances lodged with the applicant or are limited to formal demands for compensation. See, for example, Mirich v. Underwriters at Lloyd's London, 64 Cal. App. 2d 522; 149 P. 2d 19 (1944); Cole v. Calaway, 140 Cal. App. 2d 340; 295 P. 2d 84 (1956).

It was therefore proper for the lower court to construe this language in the more restricted or narrow sense in favor of the insured and rightly hold that Mrs. Adelstein's grievance was not the type of formal demand contemplated by Question 15. Pendell v. Westland Life Ins. Co., 95 Cal. App. 2d 766; 214 P. 2d 392 (1950). The "claim" was received by a nurse at home and relayed through the resident manager to Dr. Carter and Mikkelson, and the latter advised the insured only of a "possible claim by Mrs. Adelstein." Dr. Carter, in his letter to Dr. Ashley, had expressed hope that the matter "would soon blow over." This was the extent of the "claim" at the time Dr. Ashley submitted his application, and at that time it was little

more than an ordinary grievance which must not be unfamiliar to members of the medical profession.[4] Under these circumstances, we cannot say that the lower court erred in finding that appellant had failed to establish its defense of misrepresentation.

The second question raised by appellant is whether the failure to disclose Dr. Ashley's conviction and loss of narcotics stamp constituted a "concealment" under the California Insurance Code.

Section 330 of that Code defines concealment as the "[n]eglect to communicate that which a party knows, and ought to communicate . . . ," and further sections permit the other party to rescind whether the concealment is intentional or not.[5] Cohen v. Penn. Mutual Life Ins. Co., 48 Cal. 2d 720; 312 P. 2d 241 (1957); Mirich v. Underwriters at Lloyd's London, supra. Section 332 provides:

> Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract . . .

Dr. Ashley was not called as a witness, and there is nothing in the record before us tending to show that

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[4]The record reveals that Mrs. Adelstein eventually filed a complaint against Dr. Ashley, but this occurred after his application was submitted and the insurance issued; this could have no effect on the fact that no "claim" existed at the time the application was rendered. See Chase v. Sunset Mutual Life Assn., 101 Cal. App. 625, 281 Pac. 1054 (1929); Brubaker v. Beneficial Standard Life Ins. Co., 130 Cal. App. 2d 340, 278 P. 2d 966 (1955).

[5]See footnote 2, supra.

he believed his criminal conviction or loss of narcotics stamp was germane to the issuance of the policy or that he gave any thought to these matters in that connection.

However, the statute also imposes the additional duty upon the applicant to communicate all facts to the insurer "which are" material without regard to his own belief. Thus, the basic issue presented is whether the undisclosed facts are material as a matter of law; the burden of proving such materiality rested upon appellant. Olson v. Standard Marine Ins. Co., 109 Cal. App. 2d 130; 240 P. 2d 379 (1952).

Materiality is to be determined ". . . not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due . . ." Calif. Ins. Code §334. We have recently construed this section and held as follows:

> This test looks only to the evidence concerning the attitude or practice of the insurance company involved in the suit. The courts of California have determined that under §334 of the California Insurance Code they are required to adopt this . . . test in determining the materiality of concealed or misrepresented facts.

Merchants Fire Assur. Corp v. Lattimore, 263 F. 2d 232, 241 (9th Cir. 1959). . .

Applying this standard to the present case, we note a complete absence in the record of any evidence showing that appellant by its "attitude and practice" considered Dr. Ashley's conviction or loss of narcotics

stamp material." Nor was any inquiry directed to these matters, in appellant's own application; the failure to inquire into such facts in the first instance has been held to demonstrate a lack of interest in them, negativing their materiality. Farmers Auto Exch. v. Calkins, 39 Cal. App. 2d 390; 103 P. 2d 230 (1940); Olson v. Standard Marine Ins. Co., supra. This lack of inquiry, coupled with appellant's failure to meet its burden by otherwise establishing materiality, compels the conclusion that the lower court did not err in finding that the defense of concealment was not sustained.

Lastly, appellant urges that in any event the contract of insurance was rescinded prior to commencement of any action on the policy. This contention is based upon the fact that appellant served its notice of rescission in July, 1956, and tendered a check for the amount of the returned premium, which Dr. Ashley promptly endorsed and cashed. Appellant concludes from this that "[r]escission was timely and effectual as to Dr. Ashley. Plaintiffs Goff rights under the policy were no better than those of Dr. Ashley,

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"Appellant seems to suggest that Dr. Ashley's failure to disclose Mrs. Adelstein's grievance was also a concealment as well as a misrepresentation. There was testimony by Thomas Hadfield, a vice-president of appellant, that a patient's "claim" involving misuse of narcotics would be material and preclude issuance of the policy, but this evidence is subject to the same infirmity as the answer to Question 15 in the application, for at the time the application was submitted, little more than a rather vague grievance had been expressed, upon which no action had been taken by the patient, no "claim" in the sense of a formal demand for compensation had been asserted and thus no material fact was concealed.

. . . Rescission was therefore equally timely and effectual as to plaintiffs Goff."

This contention apparently suggests that there was a mutual rescission of the policy between appellant and Dr. Ashley, or at least that a unilateral rescission was effected without objection by the insured. Yet appellant has not shown that the policy was invalid or that it had a right to rescind under the California Insurance Code. Further, the cause of action against the insured accrued in October, 1955, and suit was brought by the Goffs against Dr. Ashley in December of the same year. Since the policy was valid and still in effect at that time, neither the insured nor the insurer could deprive the Goffs of the vested rights which they had already perfected. Under these circumstances, "[t]he loss or liability insured against in the insurance policy was for the benefit of these plaintiffs, and when their cause of action accrued, no subsequent act of the insured could deprive them of it." Hooker v. American Ins. Co., 12 Cal. App. 2d 116, 123; 54 P. 2d 1128, 1131 (1936); see also, Georgia Casualty Co. v. Boyd, 34 F. 2d 116 (9th Cir. 1929).

Affirmed.

(Endorsed) Opinion Filed Aug. 25, 1960.

Frank H. Schmid, Clerk.

United States Court of Appeals
For the Ninth Circuit

AMERICAN MUTUAL LIABILITY INSURANCE Co., a Corporation, *Appellant,* vs. KATHLEEN ANN GOFF, CHARLES T. GOFF, JR., and BETTE JO GOFF, Minors By and Through Their Guardian Ad Litem, Charles T. Goff, and CHARLES T. GOFF, *Appellees.*	No. 16,375

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed) Judgment filed and entered August 25, 1960.

Frank H. Schmid, Clerk.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1960

No. 502

AMERICAN MUTUAL LIABILITY INSURANCE Co., a corporation,
Petitioner,

vs.

E. VERNON ASHLEY, KATHLEEN ANN GOFF, CHARLES T. GOFF, JR., and BETTE JO GOFF, Minors, By and Through Their Guardian ad Litem, Charles T. Goff, and CHARLES T. GOFF,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

STATEMENT OF THE CASE.

On the 9th day of January, 1955, E. Vernon Ashley, a licensed, practicing physician of the State of Cali-

fornia, made an application for a policy of malpractice insurance with defendant (petitioner herein), American Mutual Liability Insurance Co. (T. 55.) A binder policy was issued with the application (T. 60) and the policy was renewed on May 1, 1956 for a period of one year. (T. 8-25.)

During the month of October, 1955, Bette Jo Goff, the wife and mother of the plaintiffs herein, while under the care of E. Vernon Ashley, died as a result of Ashley's malpractice. Suit was filed in December, 1955 in the County of San Joaquin, State of California and at which time the defendant (petitioner herein), American Mutual Liability Insurance Co., retained the law firms of Neumiller, Ditz & Beardslee and Peart, Baraty & Hassard to represent Ashley. (T. 152-153.)

In June of 1956 the above two named law firms were substituted by Leroy F. Parker, Esq. for the defense of the malpractice suit. (T. 153.) Prior to this substitution of attorneys, the defendant (petitioner herein) notified E. Vernon Ashley that it was rescinding the policy of malpractice insurance, defendant's Exhibit B. (T. 134; Paragraph VI of defendant's Amended Answer and Cross-Claim.) Ashley cashed the check for the return premiums, defendant's Exhibit C (T. 134) after filing the present action for declaration of rights of the insurance policy. Trial was held in April of 1957 and a judgment for $75,932.00 was returned against Ashley. Dr. Ashley, prior to the trial of the malpractice suit, substituted Leroy F. Parker, Esq. by appearing in propria persona. At the trial of the matter therein Ashley did not appear.

In November of 1957 (T. 124) Ashley filed a Petition in Bankruptcy in the United States District Court for the Northern District of California, Northern Division. The policy of insurance is not an asset of the bankrupt. However, the claim against Ashley has been discharged by the Bankruptcy Court.

During the month of November, 1954, Dr. Ashley was in the Glendale Sanitarium (T. 139) while he was an employee of Dr. A. E. Carter. (T. 146.) At that time Ashley had a conversation with a Ward Mikkelson who was the business manager of Carter's clinic. (T. 136.) The conversation concerned a purported expression of dissatisfaction of treatment by a Mrs. Adelstein against Ashley. (T. 138.) Mr. Mikkelson testified the basis of his knowledge of Mrs. Adelstein's grievance was given to him by Gladys Carter, wife of Dr. Carter. (T. 137.) Mrs. Carter testified that a nurse in her husband's office had told her that Mrs. Adelstein had talked with the nurse by telephone and had told the nurse that Adelstein was dissatisfied with the work of Dr. Ashley (T. 142) and that no demand was made. (T. 143.)

Dr. Carter, a licensed physician of the State of California, and the employer of Ashley, during the month of November, 1955, had written Dr. Ashley a letter to the effect there might be an impending law suit by Mrs. Adelstein against him and Dr. Ashley, defendant's Exhibit C. (T. 146.) He based his knowledge of Mrs. Adelstein's dissatisfaction on information given to him by his wife and the girls in his office. (T. 148.)

On November 26, 1954, E. Vernon Ashley pleaded guilty to three counts of Violation of Section 11165 of the Health & Safety Code of the State of California and to one count of Violation of Section 11225 of the Health & Safety Code of the State of California, defendant's Exhibit F.

On February 16, 1955, Mrs. Adelstein through her attorneys filed a Complaint against Ashley and others alleging improper medical treatment. Defendant's Exhibit E.

Mr. Thomas Hadfield, the vice president in charge of the Malpractice Division of the defendant company testified that he gave notice of rescission of the insurance contract to Ashley. He further testified that the notice of rescission was based on information obtained from Ashley by a member of the law firm employed by the defendant company to defend Ashley in the malpractice suit in which the Goffs were party plaintiffs. (T. 155.) He also testified that no agent contacted Ashley regarding the application for insurance and that no instructions were given or forwarded with the application. (T. 159.) The defendant company did not ordinarily look for addiction to narcotics or alcohol, but the new application form will contain questions as to the use of narcotics. (T. 163.)

REASONS WHY WRIT SHOULD NOT BE GRANTED.

I

THE COURT OF APPEAL'S DECISION IS NOT IN CONFLICT WITH APPLICABLE CALIFORNIA LAW.

Petitioner's contention that Dr. Ashley's conviction under Sections 11165 and 11225 of the Health and Safety Code of the State of California amounted to moral turpitude is not justified by cases it cites as authority. As to *Meyer v. Board of Medical Examiners*, 34 Cal. 2d 62, and *Davis v. State Board of Medical Examiners*, 108 Cal. App. 2d 356, these are cases concerned with the violation of Section 11164 of the Health and Safety Code, which is furnishing drugs to a known addict and bears no relationship to the charges placed against Ashley. Further, under the holding of *Brainard v. The State Board of Medical Examiners*, 68 Cal. 2d 591, the violation of Section 11225 does not involve the offense of moral turpitude, but the circumstances surrounding the commission might. There has been no showing in this case that the circumstances surrounding the violation of Section 11225 involved the question of moral turpitude.

It is well settled law that the insurer is bound to use such language as to make the contract clear to the ordinary mind. Any ambiguity, uncertainty, or reasonable doubt is to be resolved by a construction in favor of the insured. *Artukovich v. St. Paul Mercury Indemnity Co.*, 150 Cal. App. 2d 312; *Oil Base Incorporated v. Transport Indemnity Co.*, 143 C.A. 2d 453; *Wildman v. Government Employees Insurance Co.*, 48 Cal. 2d 31; *Arenson v. National Auto & Casualty*

Insurance Co., 48 Cal. 2d 528. Various legal authorities in defining the word "claim", have given the import of "to demand as due". *U. S. v. Trezer*, C.A.N.J. 234 Fed. 2d 589; *U. S. v. Lockwood*, 81 Fed. 2d 468; *Williams v. U. S.*, 134 Fed. Supp. 333; *U. S. v. Spalding*, 13 N.W. 357, 360; *U. S. Bank v. Ajax Utah*, 297 Pac. 434; *Stewart v. McCallister*, 220 Pac. 2d 618; *People v. Teitelbaum*, 163 Cal. App. 2d 187. The record of the trial does not contain any instance where a demand was made upon Ashley. Hence, the petitioner has not met its burden of proof that a claim in fact ever was made or that Ashley acted in bad faith.

Before concealment may be a basis for rescission the concealment must be material. It would be presumed that the insurer would ask in its application of things it felt to be material. *Olson v. Standard Marine Insurance Co.*, 109 Cal. App. 2d 130. Thus it would follow that if the question is not asked and the matter is not brought forth voluntarily by the applicant, the insurer cannot complain for the matter is not material.

Petitioner's authorities cited on page 11 of its brief do cover the law regarding fraud in reference to insurance contracts, however, they are not pertinent herein, for the factual situation in those cases is where the applicant for a life insurance policy misrepresented his physical condition in response to direct question concerning his disability. It was found by the trial court and approved by the Court of Appeals that as a matter of fact that question 15 of the application was ambiguous and there was no misrepresentation as

to whether or not a claim had been lodged against Ashley. Further, it was found that petitioner had not established that Ashley's convictions were material or that any inquiry was directed toward the subject. From the foregoing facts the Court of Appeals for the Ninth Circuit did apply the law applicable.

Ashley's acceptance of the check tendered with the letter from plaintiff containing the offer of rescission cannot alter the rights of the Goff family under the contract. The cause of action for malpractice had arisen in October 1955 and at which time the Goff family became the beneficiaries of the policy. The notice of rescission and the check were tendered in June, 1956, and the rights of the Goff family under the policy had matured at that time. *Hooker v. American Insurance Co.*, 12 Cal. App. 2d 116; Section 2313 *Civil Code of California*; *Grosam Casualty Co. v. Boyd*, 34 F. 2d 116.

CONCLUSION

For the foregoing reasons, it is respectfully submitted, the Petition for Writ of Certiorari should be denied.

Dated, Modesto, California,
November 16, 1960.

J. WILMAR JENSEN,
Attorney for Respondents.

WILLIAM R. LUNDGREN,
HANCOCK & LUNDGREN,
Of Counsel.